

**STITES & HARBISON** PLLC  
ATTORNEYS

June 23, 2008

**HAND DELIVERED**

Appeal of Enforcement Order, TDEC-OGC  
20th Floor, L & C Tower  
401 Church Street  
Nashville, TN 37243-1548

RE: In the Matter of South Central Tennessee Railroad Authority and K.W. Lankford  
Excavating, Director's Order WPC07-0265

To whom it may concern:

Enclosed herewith is the appeal and petition for hearing on behalf of K.W. Lankford  
Excavating, in the above referenced matter.

Please let me know if you have questions.

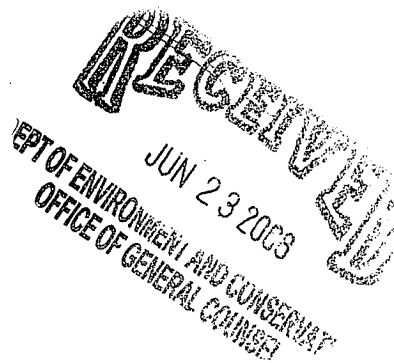
Very truly yours,

STITES & HARBISON, PLLC

William L. Penny

Enclosure

cc: Kerry Lankford  
Devin Wells



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14457N:060005:781854:1:NASHVILLE

**BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD**

**IN THE MATTER OF:**

**SOUTH CENTRAL TENNESSEE  
RAILROAD AUTHORITY and  
K. W. LANKFORD EXCAVATING,**

**Respondents.**

**DIVISION OF WATER  
POLLUTION CONTROL**

**CASE NO.: WPC07-0265**

**K. W. LANKFORD EXCAVATING'S ANSWER TO COMMISSIONER'S ORDER AND  
ASSESSMENT AND PETITION FOR HEARING**

Comes now K. W. Lankford Excavating, by and through counsel, and hereby submits this Answer to Commissioner's Order and Assessment and Petition for Hearing and for good cause would show:

1. The Respondent admits the allegations in Paragraph I.
2. The Respondent admits the allegations in Paragraph II.
3. The Respondent admits the allegations in Paragraph III, but service may be made on the undersigned.
4. To the extent a response is required to Paragraph IV, Respondent would show that the statutory and regulatory citations are paraphrases or incomplete quotes and would deny any language not expressly contained in such statute or rules.
5. In response to the allegations in Paragraph V, Respondent admits it is a person but denies it has violated the Act.

6. To the extent a response is required to Paragraph VI, respondent would show that the statutory and regulatory citations are paraphrases or incomplete quotes and would deny any language not expressly contained in such statute or rules.

7. The Respondent admits the first sentence of Paragraph VII but denies the remainder of the paragraph.

8. The Respondent admits the allegations in Paragraph VIII.

9. The Respondent admits the allegations in Paragraph IX.

10. The Respondent admits that division personnel were on-site on the dates mentioned, but lacks sufficient information to either admit or deny what Division personnel noted. Respondent would further show some offsite sedimentation related to the project occurred because of rainfall events which exceeded the design storm event. Respondent removed any offsite sedimentation and used a vacuum truck to remove excess sedimentation from Mr. Loveless' spring to his satisfaction. In addition, Respondent paid for a city water tap for Mr. Loveless. Respondent would also show there were numerous other sources of sedimentation from logging activities as well as other land use activities, neither of which are within the control of Respondent.

11. The Respondent admits the allegations in Paragraph XI.

12. The Respondent admits the first sentence in Paragraph XII. Respondent denies that inspections were not conducted in that the inspection reports, maintained in the SWPPP box had been stolen. Respondent denies the remainder of Paragraph XII.

13. In response to the allegations in Paragraph XIII, the Respondent admits that the Division inspected the site on November 16, 2007, but lacks sufficient information as to what the Division personnel noted and neither admits nor denies the remaining allegations in Paragraph XIII.

14. In response to the allegations in Paragraph XIV, the Respondent admits that the Division inspected the site on November 20, 2007, but lacks sufficient information as to what the Division personnel noted and neither admits nor denies the remaining allegations in Paragraph XIV.

15. In response to the allegations in Paragraph XV, the Respondent lacks sufficient information to make a response and neither admits nor denies the allegations.

16. The Respondent denies the allegations in Paragraph XVI.

17. The Respondent denies the allegations in Paragraph XVII.

18. All allegations not expressly admitted are hereby denied.

19. As Respondent's First Affirmative Defense, Respondent would show that the Commissioner's Order and Assessment fails to state a claim for which relief may be granted, in that natural resources damages as that term is used and assessed in the order is not a claim which is recognized by the Water Quality Control Act.

20. As Respondent's Second Affirmative Defense, Respondent would show that the action relative to natural resources damages is void because it is based upon an unpromulgated rule.

21. As Respondent's Third Affirmative Defense, Respondent would show the Commissioner has no authority to assess natural resources damages as defined in this Order and any such assessment exceeds the statutory authority of the Department and is *ultra vires*.

22. As Respondent's Fourth Affirmative Defense, Respondent would show that in assessing the civil penalty and the natural resources damages the Commissioner did not properly consider the factors required to be considered by Tenn. Code Ann. § 68-3-115 and was based upon unlawful procedure.

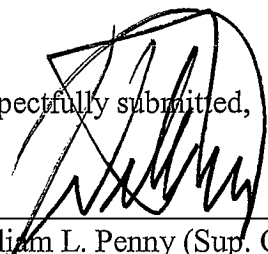
23. As Respondent's Fifth Affirmative Defense, Respondent would show that the acts complained of were Acts of God and an unavoidable accident.

24. As Respondent's Sixth Affirmative Defense, Respondent would show upon information and belief that actions complained of were in whole or in part the responsibility of third parties.

25. As Respondent's Seventh Affirmative Defense, Respondent would show that the Board's classification of waters not specifically named in rule 1200-4-4 is in excess of their authority as set out by the Water Quality Control Act. Any action taken by the Commissioner in reliance upon such rules is based upon unlawful process and is otherwise unconstitutional.

NOW, HAVING FULLY RESPONDED, Respondent K.W. Lankford Excavating hereby appeals the Commissioner's Order and Assessment to the Water Quality Control Board and requests a hearing. At such hearing Respondent requests that this matter be dismissed with prejudice and Respondent be awarded such other, further and general relief to which it may be entitled, including an award of attorneys fees pursuant to Tenn. Code Ann. 4-5-325.

Respectfully submitted,



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Counsel for K. W. Lankford Excavating

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer and Petition for Hearing was served by hand delivery, on this 23rd day of June, 2008 upon:

Devin Wells  
Assistant General Counsel  
Office of General Counsel  
20th Floor L & C Tower  
Nashville, TN 37243  
Phone: 615-532-1031



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William L. Penny